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EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
Petitioner,

V.

BIG D HAZMAT, INC., DUNCAN
SERVICES, INC. AND ROBERT L.
DUNCAN, RESPONDENTS
Respondents.

§ BEFORE THE STATE OFFICE
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§ OF
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§ ADMINISTRATIVE HEARINGS
§

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**RESPONDENTS BIG D HAZMAT, INC., DUNCAN SERVICES, INC.
AND ROBERT L. DUNCAN'S RESPONSE TO EXECUTIVE DIRECTOR'S
EXCEPTIONS AND SUGGESTED MODIFICATIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

COMES NOW Big D Hazmat, Inc., Duncan Services, Inc. and Robert L. Duncan ("Respondents") and files the following Response to Executive Director's ("ED") Exceptions and Suggested Modifications to the Administrative Law Judge's ("ALJ") Proposed Order:

1. The ED Urges Imposition of Penalty for a Violation the ED Admittedly Failed to Prove

As presented in the Executive Director's ("ED") Exceptions and Suggested Modifications to the Administrative Law Judge's ("ALJ") Proposed Order, the ED objects to the Hearing Examiner's refusal to impose a sanction which was not addressed at the hearing and not supported by evidence. By its own admissions, the ED presented no evidence of a violation of Tex. Water Code § 26.121.

Furthermore, the ED admits its lack of evidence and argument in the following exemplary respects:

- "[T]he term 'evacuation permit' was not discussed at length during the hearing on the merits." (ED Exceptions at 2) (Apparently the ED believes it is

entitled to a finding based on evidence and argument which was not discussed.);

- "Mr. Morgan did not personally witness wastewater actively being transferred between [the clarifier] and [the aeration basin], he did observe an oily sheen [and hydrocarbon odor]." (ED Exceptions at 4) (This mere supposition is not evidence and will not support the ED's burden.);
- "It is unclear to the ED why a hose was present in the clarifier if Respondents are maintaining that the clarifier was never used in the wastewater treatment process." (ED Exceptions at 4) (If it is unclear to the ED, then it should be *at least unclear* to the finder of fact. Again, the ED's best guess does not constitute *evidence*.); and
- "The fact that Mr. Morgan observed an oily sheen . . . suggests that some type of petroleum based product was present[.]" (ED Exceptions at 4) (With all respect, a "suggestion" of "some type of petroleum" is not evidence, has no probative value, and falls far from the clear and convincing burden unmet by the ED in this case).

The ED's Exceptions cannot be granted on the § 26.121 violation unless the Hearing Examiner made factual findings opposite of those which the ED admits. The burden of proof was on the ED, a burden which was not carried. In short, given the lack of credibility advanced by the ED in its brief, the Hearing Examiner need not revisit "the credibility of the Respondents' testimony and evidence in this matter" much less "reconsider the record as a whole and the credibility of all the witnesses at the hearing." Based upon the unclear and contradictory arguments the ED presents, the ED's Exceptions concerning violation of Tex. Water Code § 26.121 should be overruled.

2. Respondents' Position is Fully Set Forth in their Previously-Filed Exceptions

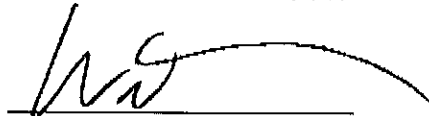
On August 22, 2011, Respondents filed their own Exceptions to the Proposal for Decision. To serve as a rebuttal, Respondents hereby incorporate, for all purposes their Exceptions to the Proposal for Decision filed on August 22, 2011.

3. Conclusion

As has been demonstrated above, the Hearing Examiner's holdings to which the Executive Director objects were consistent with both law and evidence as presented at the hearing. The Executive Director's exceptions should be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been either hand-delivered, sent by U.S. Mail, Certified Mail, Return Receipt Requested, and/or Facsimile Transmission to the following service list this 1 day of September, 2011.



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